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TRADEMARK OFFICE

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Applicant: Abdullovska

Title: RETAIL SNACK FOOD PACKAGE WITH DIP IN THE BAG

Group Art Unit: 1761

Examiner: S Weinstein

Hon. Commissioner of  
Patents and Trademarks  
Arlington, VA. 22202

**BRIEF ON APPEAL**

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**I. STATEMENT OF INTEREST.**

The real party in interest is that party identified in the caption of the brief, namely Frank Abdullovski, applicant.

**II. RELATED APPEALS AND INTERFERENCES.**

There are no other related appeals or interferences that relate to this case and known to the applicant's legal representative which will have a direct effect or be directly affected by or have a bearing on the Board's decision in this appeal.

**III STATUS OF CLAIMS.**

Applicant's claim 7 has been finally rejected by examiner's final office action dated 12/4/01.

**IV. STATUS OF AMENDMENTS AFTER FINAL.**

There are no amendments after final.

**V. SUMMARY OF THE INVENTION.**

The invention is claimed and directed towards a snack food product package for retail use that comprises a large packages containing tortilla chips and a smaller soufflé' type of container containing bean dip or cheese dip.

**VI. ISSUES FOR REVIEW.**

Whether claim 3 is obvious in view of the prior art ref U' in view of ref V' and V'' further in view of references: V, U, W, X and N and in view of admission of prior art.

## **VII. GROUPING OF CLAIMS.**

Claim 3 is the sole pending claim, there are no dependent claims.

## **VIII ARGUMENT.**

**A THE EXAMINER'S ARGUMENTS FAILS TO ADDRESS WHETHER THE PROPOSED COMBINATION WOULD BE PREFERABLE OR DESIRABLE IN TERMS OF WHAT IS BEING TAUGHT BY THE PRIOR ART.**

There are many references that are combined for purposes of this rejection, however not one of them stands for the proposition that soufflé' cups, as they are understood in the prior art. can be used for many varied purposes not just as something to hold salsa in.

One by one the examiner cites each reference in a series of references and picks one feature out from each, and then argues that this or that feature is "obvious" or "conventional." For instance on page 3 of the final action he says:

"...applicant is not the first to employ soufflé type cups, applicant is not the first to provide soufflé style cups with a dip, and applicant is not the first to provide a cheese dip for tortilla chips...In summary it would have been obvious in view of the art taken as a whole to...substitute one conventional package structure for another conventional package structure..." (final action of 11/5/01)

One almost feels embarrassed for the applicant who must have been a terribly non creative fellow to have such a litany of "not the firsts to be recited against him. It is as if the examiner wishes to cite the inventor for a series of creative violations on his way to the Patent Office and then decide that he does not deserve the his patent because he has committed so many violations.

How many non creative citations, must the poor applicant have cited against him before he can prevail at the patent office? Should the applicant be afraid since he used "conventional" plastic for his packaging or that he used "conventional" tortilla flour in his chips?

The answer is of course "no," because it does not matter how many non creative ideas that inventor has used in his invention so long as the combination of features does not suggest itself in the prior art.

In the final action (as well as the previous actions) the examiner overlooks the fundamental principle of obviousness determinations and, that is, that the prior art must show the preferability or desirability of a combination of features before there can be a finding of obviousness.

One cannot go through prior art, picking and choosing features, and saying that this or that feature is conventional or obviousness in a vacuum. For example, on page 2 of the final action:

"As noted previously, applicant's admission of the prior art discloses he employs one of two industry wide type[s] of condiment container[s], i.e.. a soufflé' cup or a squeezable packet. Therefor, the condiment or dip package is conventional. To modify

the combination and substitute one conventional package for another conventional package for its art recognized and applicant's intended function would have been unequivocally obvious." (final action of 11/5/01).

The examiner has reached a conclusion of obviousness, not by a comparison of the prior art to the invention, but rather merely because the applicant admits that one or more of the features of his invention is used in the industry.

It is irrelevant how many of the applicant's claimed elements are industry-wide or conventional, unless it is shown that the proposed combination of elements is preferable or desirable according to the teachings of the prior art.

The applicant's invention may use or contain hundreds of conventional industry wide items in it, and yet may be patentable still, if the prior art does not teach that the proposed combination is preferable or desirable.

Here the examiner omits any analysis of whether a feature is preferable or desirable in the context of the applicant's invention and rather concludes that the elements of the bean dip and the soufflé' cup are obvious, simply because each element per se, is well known.

Such a conclusion of "conventional" or obviousness (the terms are used synonymously by the examiner here) is senseless until the context is shown, i.e. until what is taught in the prior art is compared to the invention under consideration. Only then, can one say whether a particular combination is taught by the prior art. Such a combination must be preferable or desirable according to the prior art.

Nor is there any basis to conclude that one can propose a 103 combination of references by substituting one conventional packaging for another conventional packaging based upon its "art recognized and intended function." There is no legal basis for such reasoning. Such reasoning brings up the well known obviousness principle that: it is not enough that a combination of references be merely possible, the proposed combination must be shown to be preferred or desirable by the prior art.

Does the prior art teach that it is preferable or desirable to combine the soufflé' cup with a bean dip? Nowhere does the examiner examine this seminal question. This question must be reached before we can conclude a that elements of the applicant's invention are conventional or obvious.

**B. NONE OF THE REFERENCES EITHER ALONE OR IN COMBINATION SUGGEST THE IDEA OF COMBINING A SOUFFLÉ' CUP CONTAINING BEAN DIP OR CHEESE DIP IN A LARGE SNACK FOOD PACKAGE IS PREFERABLE OR DESIRABLE.**

None of the examiner's arguments show any evidence in the prior art that teaches that the combination of the soufflé cup with the dip and the chips is obvious. There is no such teaching anywhere that the proposed combination is preferable or desirable.

None of the prior art teaches the idea that it is preferable or desirable to have a retail package containing tortilla type chips have cheese dip or bean dip contained in a soufflé type of container. (The record of the case is clear that when we say "soufflé" type of cup we mean a cup that has an overlay, e.g. plastic, over a cup and the overlay can be removed for serving.)

Contrary to what the examiner says, we are not arguing the references individually:

"Applicant argues each reference separately as if it were applied in a vacuum." (page 3, final action of 11/5/01).

On the contrary, the applicant has the art on the whole and in doing so has studied each and every reference to find any teaching that might suggest that it is preferable or desirable to combine soufflé cups and bean or cheese dip. It is the examiner who is operating "in a vacuum" by reasoning that because an individual element is conventional or well known that it then becomes an obviousness case without any consideration of the context of the prior art and the invention.

In discussing what is taught and not taught by the prior art, the applicant will discuss each reference individually in serial fashion. We know of no other approach to take, seeing as how the examiner is unwilling to cite to any particular patent or patents that suggests the proposed combination is preferable or desirable.

None of the prior art suggests the proposed combination, and in fact none of them even address how to use soufflé cups in combination with a larger snack food package such as the applicant's larger package.

Ref. U' appears to be a one paragraph abstract of a possible product to be released on the market. It has no diagrams or pictures to accompany the product that is mentioned there. Reference U' does not teach the idea of bean dip or cheese dip in association with a soufflé' cup as part of snack food package.

Reference U' mentions the use of salsa in a container. No particular salsa container is contemplated by this reference which seems to also have to do with barbecue sauces and catsup.

Moreover, reference U' does not provide any teaching of the preferability or desirability of combining soufflé' cups used in the prior art with the products in reference U'. Nor does it teach the preferability of substituting a salsa container for a soufflé type container. or substituting bean dip for salsa.

As is typical of much of the cited prior art, ref. U' does not speak to the motivations of the inventor of the product described there or of problem solving function of this invention. In fact we don't know what the inventor's reasons for inventing this product were. Hence there is little or no teachings of any merit in this reference that relate to the substitution of one type of package for another or of substituting salsa for bean dip. Moreover, there are no teachings that suggest any reason for combining this reference with other prior art snack food packaging for section 103 purposes.

Ref. V' deals with salsa and does not mention what type of package for the salsa, merely referring to it as "a package." Thus there can be no teaching or suggestion that suggests substituting a soufflé' type cup for the package of ref V' or of substituting dip for salsa. There are teachings in this reference that suggests how the product is to be used or what were the motivations of the inventor in inventing this product. There is no teaching or suggestion of substituting dip for salsa and/or substituting a soufflé' cup for a package.

Again the product of ref. V' appears to deal with catsup, barbecue and chili sauces. Such sauces are traditionally sold in the industry through burst type packages.

Ref. V" also does not show or suggest the use of dip or a soufflé cup. Again, there is little or nothing in the way of teachings here, the reference is a one paragraph product release of a product that might hit the market. There are no teachings of what was the purpose or the motivation of that inventor and his product. There is no suggestion either in that reference or in any of the references of substituting dip for the salsa of ref. v" nor are there any teachings or suggestions for substituting a soufflé' cup for the package in ref V".

Ref. U appears to use a cheddar cheese/jalapeno dip used in connection with the product. Again, the reference appears to be nothing more than an abstract of a product that is to be placed on the market. There are no diagrams or pictures to accompany the product release. There is no teaching on how to make and/or use the product. All that is said of the container is that it is a "0.3 oz. container."

Moreover, the product release does no teach or suggest that a soufflé' type cup, as contemplated by the applicant can be substituted for the package mentioned in ref. U for the purpose of holding the dip of the applicant's invention.

Again there is little or nothing stated for the motivations of this inventor of the product referred here (ref. U) , or what problems in the prior art that that product appears to solve. Moreover, there is nothing stated about how to use the invention and nor is there anything stated about what possible modifications might be made to this product in order to make it perform better. Thus there is no teaching or suggestion in ref. U that shows or suggests the preferability

or desirability of substituting the applicant's soufflé' type cup for the package of that invention.

Nor did the applicant's discussion of prior art admit that putting dip in a soufflé cup is shown or suggested in the prior art.

The applicant's use of a bean dip or cheese dip condiment in a soufflé' type of container within a second larger package containing chips is neither shown nor suggested by the prior art. There are no teachings in the prior art that suggest the preferability or desirability of substituting dip for salsa in such product packaging. Nor are there any teachings that show or suggest the idea of substituting soufflé' type cups for other "packages" such as burst packages in the prior art.

**C. THE PRIOR ART CITED TEACHES AWAY FROM THE IDEA OF USING A SOUFFLÉ TYPE CONTAINER TO HOLD A CONDIMENT.**

A perusal of the actual ingredients of the ref. U' product shows that the primary purpose of ref. U' is to hold barbecue sauce, chili sauce and catsups. It is well known in the industry of fast foods that sauces like these are usually held in burst packages. There is no other suggestion or motivation in the prior art to suggest the substitution of soufflé' cups for bursts packages in either this invention or others in the prior art. In fact, the prior art in so far as we understand it (i.e. the industry standard for sauce holding packages) would teach away from, rather than suggest, the applicant's invention.

The products in ref. V' also appear to be similar to that of U' and again these are the types of condiments (hot sauces, etc.) that are traditionally sold in burst packages and not in soufflé cups.

None of the rest of prior art cited teach the idea of holding dip in a soufflé' type of container. The rest of the prior art mentions containers other than soufflé' cups. see for example: "a sachet" (ref. w) "plastic pouch" (ref. x) "small bags" (ref. n) a packet (ref. v) "a container" (ref. v").

Of these other prior art references, only reference x deals with dip, and again, does not deal with a soufflé' cup, it has to do with a plastic pouch. Again, these types of packages are distinct from the applicant's soufflé cup. There mention in the prior art shows that the condiment container of choice in the snack field is not soufflé cups, but rather, burst packages. Therefore, the extensive use of burst packaging in the prior art teaches away from the applicant's idea of using a soufflé type of container.

**D. THERE IS NO REQUIREMENT FOR PATENTABILITY THAT THE APPLICANT PROVE THAT HIS INVENTION WILL PRODUCE NEW AND UNEXPECTED RESULTS.**

The examiner seems to argue that the applicant must show new and unexpected results in order for his invention to qualify as a new and non obvious invention. See e.g. on page 3 of the examiner's final action of 11/5/01:

"Applicant has combined a series of conventional expedients and employed them for their well known and intended function and achieved no new or unexpected results therefrom."

Such requirement is not the law. Only that unexpected results may be one factor to consider out of the total picture of whether the invention is obvious or not.

Nor is there any basis for the examiner to say that any particular claim feature is "conventional" or "expedient." Whether a feature or a series of features are non obvious is a fact issue that is dependent upon the prior art and this prior art is considered in light of the differences between the prior art and the invention. In short, whether something is obvious depends upon a comparison of prior art and invention. One cannot conclude that anything is "obvious" in a vacuum, a comparison must be made.

No element or series of elements can be obvious or "conventional" on its own, per se. Whether a feature is obvious or expedient depends on the comparison of what the inventor has invented and what is taught by the prior art.

Thus is typical of the examiner's reasoning throughout the rejection. The proposed combination is supposed to be conventional not by studying what is taught in the prior art and then comparing, but rather by finding individual features, such as a soufflé' cup in the prior art, and then arguing, long and hard, that soufflé' cups, per se, are conventional and hence the combination is obvious.

As we have stated throughout, the obviousness of whether to combine features found in the prior art cannot be done in vacuum. One cannot examine a feature individually and conclude that it is conventional or obviousness to combine it. One can only make this determination by finding that the prior art teaches that the proposed combination is preferable or desirable and not merely possible.

#### **IX. SUMMARY AND RELIEF REQUESTED:**

It is requested that the outstanding rejection be reversed and the case be remanded to the examiner for a Notice of

Allowance and/or further proceedings in accordance with such decision.

Respectfully submitted,

  
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**X. Appendix: Pending claims:**

Claim 3 has been finally rejected as of 11/5/01:

3. A combination package for the retail sale of tortilla chip products and dip for the chip products, said package comprising: a large package containing a plurality of said chips and a soufflé' cup package that is smaller than said large package and containing a dip product that is complimentary to said chip product, said soufflé' cup comprising a cup shaped member having an opening at one end and an overlay that is in air tight connection with said cup shaped member so as to close said opening, said dip product comprising a product selected from the following: bean dip and cheese dip.